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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 797

ALBERT WESTON and LIONEL WESTON,
Petitioners,

vs.

NEW JERSEY STATE BOARD OF OPTOMETRISTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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In the

Supreme Court of the United States

October Term, 1961

No. _____

Albert Weston and Lionel Weston,

Petitioners,

vs.

New Jersey State Board of Optometrists,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioners pray that a writ of *certiorari* issue to review the judgment of the Supreme Court of New Jersey affirming the decision of the New Jersey State Board of Optometrists which sustained the validity of a statute of the State of New Jersey as implemented by a regulation adopted by that Board.

Opinion Below

The opinion of the Supreme Court of New Jersey is reported at 36 N. J. 258 and is reprinted in the Appendix to this Petition.

Statement of Grounds of Jurisdiction

The judgment of the Supreme Court of New Jersey was rendered on December 18, 1961. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C., §1257(3).

Questions Presented for Review

1. May a state administrative agency, consistent with due process of law, dictate to a professional who has been duly licensed to practice his profession, the detailed manner in which he shall render his services in those aspects of his work which involve the exercise of his professional judgment?

2. If the administrative agency has any such power, may it, consistent with due process of law, exercise it so as to require a professional to perform his services in a manner which a substantial segment, if not the vast majority, of the responsible members of the profession and experts in the field are persuaded is either unnecessary, or beyond the scope of the profession, and possibly even dangerous?

3. If professionals may be regulated to the extent of detailed affirmative directions as to the manner in which they shall perform their services, what are the substantive due process standards which determine the permissible scope of such regulation? And more specifically, may an administrative agency exercise its powers so as to impose its own approach to the exercise of professional judgment when alternate approaches are reasonable, are supported by a responsible segment of the profession and of experts in the field, and are actually practiced almost universally by the profession?

4. May an administrative regulation prescribing the details of the exercise of professional judgment also provide,

consistent with the requirements of procedural due process, that failure to perform any of the prescribed details results in a mandatory suspension from practice without even permitting a showing that in the particular case sound professional judgment would demonstrate that the prescribed details were unnecessary?

Statutes and Regulations Involved

N.J.S. 45:12, §11(x) provides as follows:

"The Board shall have the power, and it is hereby made its duty to refuse to grant, to revoke or to suspend for a specified time, to be determined in the discretion of the Board, any license to practice optometry in the State of New Jersey for any of the following causes:

* * * *

"v. Prior to prescribing for or providing eyeglasses or spectacles a complete minimum examination shall be made of the patient to determine the correct lenses necessary for such a patient. The requirements of such minimum examination shall be defined by rule or regulation of the New Jersey State Board of Optometrists."

The statute providing the foregoing was enacted in 1954, to be effective March 1, 1955 (N.J.S. 45:12-19.3). There was no such statutory provision prior to that date.

Rule 8 of the New Jersey State Board of Optometrists, purportedly adopted pursuant to the foregoing statute, provides as follows:

"As authorized under Chapter 45:12-11(v), Revised Statutes (Optometry Law), an optometrist shall make a complete minimum examination and shall keep a record of the following conditions of every patient examined:

1. Complete history.
2. Naked visual acuity.
3. Detailed report of the external findings.
4. Ophthalmoscopic examination (media, fundus, blood vessels, disc).
5. Corneal curvature measurements (dioptral).
6. Static retinoscopy.
7. Amplitude of convergence and accommodation.
8. Phoria and duction findings; horizontal and vertical, distance and near.
9. Subjective findings.
10. Fusion.
11. Stereopsis.
12. Color vision.
13. Visual fields (confrontation).
14. Visual fields, central (after age 40).
15. Prescription given and visual acuity obtained."

Statement of the Case

New Jersey regulates the profession of optometry. A Board of Optometrists has been established; licenses are required, which are given only upon satisfaction of prescribed educational requirements and successful completion of a comprehensive examination administered by the Board; a wide range of practices which are considered as commercializing the practice of optometry (such as false advertising or even excessive display of one's name or of spectacles, employment by a non-optometrist, solicitation of business, etc.) are prohibited. See N.J.S. 45:12-11.

Regulations of this nature have of course been upheld by this Court. See *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483 (1955); *Semler* v. *Oregon State Bd. of Dental Examiners*, 294 U. S. 608 (1935); *Roschen* v. *Ward*, 279 U. S. 337 (1929).

The statutory scheme is obviously designed to minimize the commercial aspects of optometry and establish and maintain optometry as a profession. Indeed, the statute expressly provides in its very first phrase (N.J.S. 45:12-1),

"Optometry is hereby declared to be a profession."

Effective as of 1955 the statute was amended to include the provisions of N.J.S. 45:12, 11(v), quoted above, which purported to authorize the Board to require that every optometrist make a complete minimum examination to determine the correct lenses necessary for a patient prior to prescribing for or providing eyeglasses or spectacles.

Pursuant to that statute the Board adopted Rule 8, quoted above, establishing the requirement of 15 tests.

In June 1959 the Board filed complaints against Drs. Albert and Lionel Weston, brothers who had been practicing optometry in the City of Trenton respectively 27 and 11 years, charging that they had in a given case failed to perform the 15 tests (App. 2, 4).[1] At subsequent hearings

[1] There are two portions of the Record:

1) A printed Appendix submitted originally to the Appellate Division of the Superior Court. The Appellate Division never heard the case because the Supreme Court of New Jersey certified the case to itself on its own motion. This printed Appendix includes the hearing before the Board of Optometrists and the record of all the proceedings of that Board. References to the printed record will read "App.".

2) There is also a hectographed record of the hearing before Judge KINGFIELD designated by the Supreme Court of New Jersey to hear the matter after the remand by that Court. References to that record will read "Tr.".

before the Board of Optometrists it was stipulated that the glasses prescribed by the two Drs. Weston on the occasions in question were in no way incorrect (App. 42-16; 107-32).

At the hearing before the Board of Optometrists the petitioners contended, among other things, 1) that the statute as applied under the Rule was unreasonable and unconstitutional, and 2) that the Board of Optometrists had discriminatorily enforced the Rule (App. 259 *et seq.*). When the matter came before the Supreme Court of New Jersey it appeared that the record upon the foregoing issues was incomplete because the Board of Optometrists had refused to permit the introduction of testimony in these areas. Accordingly, the New Jersey Supreme Court by its order dated December 19, 1960 remanded the proceedings to a Judge of the Superior Court of New Jersey, Law Division, to take testimony and to make findings of fact on these two issues. Hearings were in due course had before the Law Division.

On the issue of the discriminatory application of the regulation, the petitioners presented evidence tending to show almost universal non-compliance with the Rule. Testimony was introduced showing that in Trenton not a single optometrist within a mile of the petitioners performed all the tests (Tr. 258 *et seq.*). The testimony even showed that members of the Board of Optometrists did not comply with the 15 tests (Tr. 146 to 258). This testimony all came from "shoppers" and it was precisely the same type of testimony that had been used by the Board in its proceeding against the Westons.

After the presentation of this testimony the Board stipulated before the Law Division that it would dismiss the charges against the petitioners who in turn withdrew and abandoned the charge of discriminatory enforcement since there were no further charges against them (Tr. 293 *et seq.*).

There remained, however, the question of the reasonableness and constitutionality of the Rule and the case continued as one for declaratory judgment. On this question the petitioners introduced extensive expert testimony by three ophthalmologists of unusual competence, training and experience. The Board introduced the testimony of an ophthalmologist and an optometrist.[2]

The net effect of the testimony of petitioners' experts was that on the matter of the examination of the human eye the question of what tests are required to be performed was a matter of professional judgment to be exercised in each particular case.

Some of the tests included in the fifteen are on their face absurd if required to be performed routinely in every case. By way of example, color vision deficiencies practically never affect human females. Such cases are so rare "they get written up when they show up" (Tr. 493-1). Even the idea of performing the test routinely upon all males seemed absurd since, as one doctor put it: "A Third Grade child usually knows he is color blind" (Tr. 121-25).

With regard to corneal curvature measurements, the most experienced of the expert witnesses who testified did not even have the instrument for making this test (Tr. 23-6) and he and others insisted that the only time when it is of importance to make this measurement is when contact lenses are being fitted (Tr. 22-22; Tr. 478-21). One

[2] In petitioners' brief before the Supreme Court of New Jersey we undertook a detailed explanation of each of the tests with record references to the testimony of all the experts. In this petition we have set forth a highly abbreviated summary of the expert testimony. For the convenience of the Court we have printed as Appendix G to this Petition the summary of the expert testimony which had been presented to the Supreme Court.

of the doctors, who had previously been assigned to the Scott Air Force Base, supplied the interesting information that this test was not even given in the eye examination of prospective pilots and that the clinic at the Base did not have the instrument (Tr. 477-16).

Two of the tests—amplitude of convergence and accommodation, and phoria and duction findings—are really measurements of the muscular accommodation of the eyes to each other. Petitioners' experts all agreed that these measurements were not necessary as a matter of routine; that the proper procedure was for the examiner to proceed with these measurements only when inspection with the naked eye and a crude or gross test indicated some malfunctioning. In such a case detailed measurements were indicated. The same approach was taken to tests for stereopsis and fusion, which deal with muscle functions and brain functions (Tr. 93-8; Tr. 119-11). The view of petitioners' experts on this point was supported by the text authored by Sir Stewart Duke-Elder, recognized even by counsel for the Board as "one of the world's outstanding ophthalmologists" (App. 204-27; Tr. 457-10).

Two of the tests have to do with the discovery of pathology. The visual fields test is an important diagnostic tool in respect to tumor of the brain and certain other pathological conditions. This is of course a test of utmost importance, to be undertaken by someone quite skilled in the field of pathology (Tr. 25-7; Tr. 122-18). In any event, it is a test to be used not routinely but only when there is some indication of its necessity (Tr. 93-25).

The ophthalmological examination, which is essentially an examination of the inner eye, is also an examination designed to discover pathology. Petitioners' experts considered this to be quite beyond the scope of most optometrists, especially because they are not permitted to dilate

the pupil. With an undilated pupil the examiner can see only about 20% of the eye (Tr. 9-7) and even then, by reason both of his limited view and limited training, he could hardly be expected to discern pathology (Tr. 86-16).

The only tests which could be considered routine are:

History,

Naked visual acuity,

Detailed report of the external findings,

Static retinoscopy,

Subjective findings, and

The obtaining of visual acuity after giving the prescription.

All of the others, in view of petitioners' experts, might or might not be performed, depending upon the exercise of judgment in each particular case.

Petitioners' experts expressed the view that not only were many of the tests unnecessary in every case, and to some extent beyond the field of an optometrist, but in fact they considered the requirement of the 15-point examination as a matter of routine to be dangerous. They explained that most patients do not know the difference between an optometrist and an ophthalmologist and if the optometrist goes through a time-consuming examination and tells the patient, "Your eyes are all right—here are your glasses", he gives the patient a "false sense of security. The very length of this examination makes the patient think everything is in order" (Tr. 81-13).

The experts testifying on behalf of the Board of Optometrists did not in the main disagree with the petitioners' experts on the facts. They expressed the general opinion that optometrists should perform all the tests and insisted they were competent to do so.

There was no doubt on the facts made in the record that a) few if any optometrists actually performed all the tests as a matter of routine; and b) responsible and substantial opinion considered the routine performance of all tests in every case quite unnecessary and even undesirable.

There was evidence in the record which strongly suggested that motivation of the Board of Optometrists in establishing Rule 8 was much more related to its "guild" orientation than to its concern for the health of the public. It was significant that the petitioners charged very considerably less for their eyeglasses than did anybody else in the City of Trenton. In fact it appeared that whereas the average charge by all other Trenton optometrists who had been "shopped" (and who also did not make the 15 tests) was $28.80 for a prescribed type of glasses, Dr. Lionel Weston charged $17.50 and Dr. Albert $15.50 for the same product. (See page 44 and analysis of record at footnote to page 9 of petitioners' brief before the Supreme Court of New Jersey included in the certified record before this court).

It is evident that the Rule makes unfeasible modest fees. It is compelling logic that an examination of numerous aspects of the eye, whether or not warranted in the particular case, will result in a fee higher than might be called for in a more normal type of examination. Indeed, the serious effect of the Rule upon the optometrist with a practice based on moderate fees is another illustration of an administrative agency controlled by, and reflective of, only the views of the dominant and most powerful section of the profession or industry the agency regulates. See Jaffe, Louis, "The Effective Limits of the Administrative Process: A Reevaluation", 67 Harv. L. Rev. 1105-1135 (1954).

Upon the foregoing record the Supreme Court of New Jersey sustained the constitutionality of the regulation. It summarized its appraisal of the factual aspects of the case as follows:

> "Assuming that all the experts were credible, at best we have here a reasonable difference of opinion. Such a difference of opinion cannot justify a court in holding that there has been abuse of administrative discretion." 36 N. J. at 264, App. A herein p. 6a.

How the Federal Question was Raised

The Federal question sought to be reviewed was raised at the proceeding before the Board of Optometrists at the very first opportunity so to do, i.e., by a motion to dismiss at the close of the Board's case (App. 145). There is reprinted as Appendix II to this Petition that portion of the oral motion which raised the question.

The issue was preserved and again raised in the argument before the Supreme Court of New Jersey in the brief submitted to that Court. We append hereto as Appendix I a quotation from petitioners' brief before the Supreme Court.

The Supreme Court of New Jersey acknowledged that the constitutional question had been raised. It said:

> "They also contend that their constitutional rights are violated when they, as members of a profession, are 'directed by the Board 'as to the details of the performance of duties', and that not even the Legislature could go that far. For, they say, the effect of Rule #8 is to stifle their right to exercise professional judgment." 36 N. J. at 263, App. A herein p. 4a.

Reasons for Granting the Writ

1. Though not adverted to in the opinion of the Supreme Court of New Jersey, the case presents novel questions not heretofore adjudicated by this Court, i.e., the scope of the police power in respect to the detailed regulation of professions.

Many cases establish the broad power of the state to license and regulate a profession but none deals with the novel issue as to whether such regulation may extend to the point of dictating to the professional precisely how he shall use his judgment in a wide range of details and, if so, what, if any, are the limits of such regulation?

We have found no body of law which sustains this type of dictation to a profession. We are not dealing with isolated prohibitions, e.g., that a doctor shall not commit abortions except under certain circumstances, or that a lawyer shall not intermingle clients' and personal funds, but rather with affirmative directives of the details of the practice of a profession. Analogies come readily to mind. May the lawyer be told precisely how and in what detailed manner he shall make a search, or prepare a negligence case for trial? May the doctor be told that every patient walking into his office shall be given a Wasserman test or a liver function test?

It should be emphasized that the administrative agency here seeks to dictate in the very area which involves professional judgment. Again analogies may be helpful. The lawyer may be told that a brief shall be printed on a certain size paper and may not be longer than 20 pages, or that he may not advertise. But he may not be told how many legal points he shall raise or whether and under what circumstances he should exercise his judgment as to whether to raise the Federal Constitutional question or

spend his client's money by retaining expert accountant consultants. The instant regulation reaches for the very points where professional judgment and discretion are involved.

The very novelty of the question notwithstanding the innumerable cases in this Court which deal with the scope of the police power of the states suggests that this Court should deal with the question.

2. We submit that the issue as posed above cannot be dealt with in terms of absolutes. Obviously the Legislature or an administrative agency would have the power to direct professionals in respect to some areas of the performance of their duty and even some aspects of the exercise of their professional judgment. When doctors are held liable to patients for negligence in malpractice suits that is certainly a form of the State's control over the exercise of professional judgment. In the malpractice cases, however, a body of law has developed along the following lines:

> "We think it could not be held to be negligence or unskillful treatment for a doctor not immediately to employ the X-ray in his investigation of a patient's condition; whether this or another method of inquiry shall be resorted to is a matter of judgment, and a failure to use the one or the other could not be said to be negligence * * . Where competent medical authority is divided, a physician will not be held responsible if, in the exercise of his judgment, he followed a course of treatment advocated by a considerable number of his professional brethren in good standing in his community." *Duckworth* v. *Bennett*, 320 Pa. 47, 181 A. 558, 559 (1935).

See generally in accord: *Walkenhorst* v. *Kesler*, 92 Utah 312, 67 P. 2d 654 (1937); *Gielskie* v. *State*, 10 App. Div. 2d

471, 200 N. Y. S. 2d 691 (3d Dept. 1960); *Baldor* v. *Rogers*, 81 So. 2d 658, 55 A.L.R. 2d 53 (Sup. Ct. of Fla. *en Banc*, 1955); *Bryant* v. *Biggs*, 331 Mich. 64, 49 N.W. 2d 63 (1951).

The question posed by the instant case by analogy to the professional liability cases is whether, when competent professional opinion is divided, an administrative regulation may prohibit the professional from pursuing a course advanced by a responsible and substantial number of his brethren in good standing in the profession.

Since the instant case is the first to sustain regulations of this type, it is appropriate that this Court deal with the guideposts for the extension of the police power to an area hitherto not considered to be within the range thereof.

3. The decision of the Supreme Court of New Jersey in this case ignored the heart of the question, which is: Assuming that an administrative agency may to some extent direct a professional as to what he shall do, what are the standards which determine the permissible scope of the regulation? The attitude of the New Jersey Court was in effect that the Board of Optometrists could impose any restriction that it considered reasonable, if some expert opinion supported it.

We submit that the standard is actually the reverse, namely that the professional may pursue a course which is reasonable and that the administrative agency may regulate only to the point of prohibiting unreasonable conduct. Only a complete failure to analyze the question leads to the formulation adopted by the New Jersey Court.

Thus, for example, in the debate now underway in the medical profession as to the relative merits of chemotherapy or surgery in the treatment of cancer, is it conceivable that on the basis of present day knowledge a State Board of Medical Examiners would have the power to prohibit the

one course or the other? Is not the answer that on the basis of present knowledge either course is reasonable and doctors should be permitted to pursue whichever course they think appropriate? And the power of the State Board would not be enhanced merely because some experts testified that the Board's view was sound. In other words, the test of regulation in this area is not the reasonableness of the requirement of the administrative agency but rather the reasonableness of the actions of the professional. This flows from the fact that the essence of a profession is the right to exercise judgment, at least in a manner supported by responsible segments of the profession.

People v. *Clobridge*, 249 Mich. 376, 228 N.W. 692 (1930), is a good example of the type of regulation of professional conduct which is hardly disputable. The statute there made it a crime for a physician not to treat the eyes of a new born infant with a prophylaxis within one hour after its birth. None would doubt the validity of the statute because the issue is hardly a matter of reasonable debate within the profession. But this is a far cry from dictating choices within an area of reasonable professional debate. Thus, a decision like *Clobridge* would certainly not mean that a statute or regulation could require that a doctor administer a minimum quantity of anesthesia, thereby prohibiting natural childbirth. So, too, a regulation of pediatricians could hardly decide the unending professional debate of bottle-fed v. breast-fed babies. No doubt, were an administrative regulation to be established in any of these areas the regulation could be shown to be reasonable by the testimony of some responsible experts. But that would hardly sustain the regulation in the face of proof that the alternate courses were also reasonable and supported by responsible segments of the profession.

Since this case presages an extension of power by administrative agencies seeking to regulate professionals in the exercise of their duties, it is appropriate that the ground rules for the application of constitutional limits to the police power be articulated.

4. There is a separate procedural problem which accentuates the impropriety of the regulation in the instant case and the need for review by this Court. In the only other case in the United States in which an administrative agency approached the imposition of directives of the type here involved, the regulation carefully provided that failure to comply with the rules of the administrative agency was only "*prima facie* evidence" that the professional was unfit or incompetent by reason of negligence. The Supreme Court of Texas in *Kee* v. *Baber*, 157 Tex. 387, 303 S.W. 2d 376 (Tex. Sup. Ct. 1957), sustained a regulation of its Board of Optometry which required prescribed tests to be performed. But failure to perform any test under the Texas rule "at most sets up a rebuttable presumption" of negligence. 303 S.W. 2d 382. The professional in that case could still establish "that compliance with the rule was not necessary to a proper examination of the patient in a particular case." *Id.* at 380.

The New Jersey statute and regulation do not operate in that fashion. The mere failure of the optometrist to perform a single one of the required tests automatically causes a suspension or loss of his license and does not permit a showing that in a particular case it would have been absolutely absurd to have performed the omitted test.

The case of *Adler* v. *Board of Education*, 342 U. S. 485, 495 (1952), is precisely in point. There this Court, in dealing with a statute establishing the basis for the dismissal of a teacher who was a member of a subversive organization, made it clear that the statute was sustainable and

did not present a problem of procedural due process because "the presumption is not conclusive but arises only in a hearing where a person against whom it may arise has full opportunity to rebut it." The Court there cited the New York Court of Appeals opinion, emphasizing that the dismissal did not follow of necessity but merely raised a *prima facie* case.

The inability of the optometrist in the instant case to defend by showing that in a particular instance the required test was completely unnecessary poses a serious problem of procedural due process.

CONCLUSION

We respectfully submit that this Court should grant *certiorari* and dispose of the important Federal issues herein raised.

Respectfully submitted.

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and

WESTON & KRAVITZ.
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Of Counsel.

[APPENDIX FOLLOWS]

Appendix A

Opinion of Supreme Court of New Jersey, 36 N. J. 258

Mr. Morton Stavis argued the cause for appellants (*Messrs. Gross & Stavis* and *Messrs. Weston & Kravitz*, attorneys).

Mr. William K. Miller, Deputy Attorney General, argued the cause for respondent (*Mr. David D. Furman*, Attorney General of New Jersey, attorney; *Mr. Miller*, of counsel).

The opinion of the court was delivered by

SCHETTINO, J. The sole issue before us is the validity of Rule #8 of the New Jersey State Board of Optometrists which requires optometrists to make a minimum examination, hereinafter detailed, before prescribing eyeglasses for a patient.

Appellants had been convicted by the Board of violating Rule #8 and had taken an appeal to the Appellate Division. While the appeal was there pending, we certified it on our own motion. *R. R.* 1:10-1(a). Appellants there contended that Rule #8 was an invalid regulation and that the Board of Optometrists had discriminated against them in the enforcement of said rule.

At oral argument, we concluded that the record was inadequate to determine these issues. Pursuant to R.R. 4:88-9, we directed the Law Division to take testimony and to make findings of fact on these two issues. Before the Law Division, the Board stipulated that it would dismiss the charges against appellants. Appellants thereupon withdrew the charge of discrimination against the Board, leaving for determination, as stated above, the validity of Rule #8.

The trial court held that Rule #8 is a reasonable and necessary regulation for the protection of the public health, welfare and safety.

Appendix A

Rule #8 states:

"As authorized under Chapter 45:12-11(v); Revised Statutes (Optometry Law), an optometrist shall make a complete minimum examination and shall keep a record of the following conditions of every patient examined:

1. Complete history.
2. Naked visual acuity.
3. Detailed report of the external findings.
4. Ophthalmoscopic examination (media, fundus, blood vessels, disc).
5. Corneal curvature measurements (Dioptral).
6. Static Retinoscopy.
7. Amplitude of Convergence and Accommodation.
8. Phoria and duction findings; horizontal and vertical, distance and near.
9. Subjective findings.
10. Fusion.
11. Stereopsis.
12. Color Vision.
13. Visual Fields (confrontation).
14. Visual Fields, central (after age 40).
15. Prescription given and visual acuity obtained."

The statutory authority cited in the regulation provides:

"Prior to prescribing for or providing eyeglasses or spectacles a complete minimum examination shall be made

of the patient to determine the correct lenses necessary for such a patient. The requirements of such minimum examination shall be defined by rule or regulation of the New Jersey State Board of Optometrists."

In *Abelson's, Inc.* v. *New Jersey State Bd. of Optometrists*, 5 N.J. 412 (1950), we had occasion to deal with portions of the same statute now under review. At the outset we there noted that the practice of optometry is subject to regulation under the police power. Judge (now Justice) Francis in *New Jersey State Board of Optometrists* v. *Kocnigsberg*, 33 N.J. Super. 387, 391 (App. Div. 1954) further emphasized this fact when he declared that "obviously, there can no longer be any controversy about the legal propriety of * * * prescribing reasonable regulations for the practice of * * * [optometry]." But this power is not without limitation. As we said in *Abelson's, Inc., supra* (5 N.J., at p. 249), "* * * the nature of the subject matter and the end to be served" will determine both the quality and content of the power.

The Board of Optometrists was created and established by an act entitled "An act to regulate the practice of optometry, to license optometrists, and to punish persons violating the provisions thereof." L. 1914, c. 222; N.J. S.A. 45:12-2. By N.J.S.A. 45:12-4 the Board is charged with effectuating the statutory purposes. The outer limits of the practice of optometry, up to which the statute applies are defined (in N.J.S.A. 45:12-1) to be "the employment of objective or subjective means, or both, for the examination of the human eye *for the purpose of ascertaining any departure from the normal*, measuring its power of vision and adapting lenses and prisms for the aid thereof." (Emphasis added.)

Rule making power is thereafter delegated to the Board in broad terms with statements indicating the legislative purpose as a standard. N.J.S.A. 45:12-4 states in part:

Appendix A

"The board shall conduct an investigation and ascertain the facts relating to the practice of optometry for the purpose of determining the need for, and the desirability of, rules to promote the safety, protection and welfare of the public and to effectuate the purposes of this chapter and to aid the board in the performance of its powers and duties hereunder, and the board shall thereupon make and promulgate rules and regulations for the said purposes."

Additionally, the Legislature specifically provided that the Board define requirements of a mandatory minimum examination of patients as set forth in N.J.S.A. 45:12-11(v), *supra*.

Appellants concede that the statutory provision cited in the rule is a valid exercise of legislative authority. But they contend that many of the requirements and aims of Rule #8 are not related to that limited authority because some of the tests prescribed are unnecessary to determine correct lenses for a patient. Appellants then urge that this statute should be narrowly construed and that rules thereunder should be limited to the requisities for determining the correct lenses. They would exclude any of the tests designed to reveal pathological conditions and muscular deficiencies which do not pertain to lenses.

They also contend that their constitutional rights are violated when they, as members of a profession, are directed by the Board "as to the details of the performance of duties," and that not even the Legislature could go that far. For, they say, the effect of Rule #8 is to stifle their right to exercise professional judgment. They allege as additional support for this argument that no similar restrictions are placed upon practices in the legal, medical or other professions. Furthermore, in their opinion the

Rule represents an unauthorized imposition on the public in that it has the effect of requiring people to pay to be examined for their health even though the health of others is not involved and, finally, that the Board's probable purpose in promulgating the rule is to establish and maintain high prices in the profession.

Impliedly, appellants would have us disregard all other parts of the optometry statute and base our determination of the rule's validity solely upon the statutory authority cited in the rule. Such contention appears to be based in part upon the belief that an authority cited by the Board would be the only authority a court could look to here. For us to reach such a result, however, would cause the validity of any administrative regulation to turn upon whether or not the agency or board cited the proper statutory section when promulgating a proper rule. We find no necessity for so holding. A rule or regulation should be upheld if there is in fact sufficient underlying authority. Moreover, even if we examine only that statutory section on the theory that it alone was intended to control, there is a basis for upholding the rule.

[1] Administrative rules and regulations have in their support the rebuttable presumption of validity if they come within the ambit of delegated authority. *Sherry* v. *Schomp*, 31 N. J. Super. 267 (App. Div. 1954); *In re Regulation F-22 of Office of Milk Industry; New Jersey*, 32 N. J. 258, 261 (1960). Unless they are clearly *ultra vires* on their face, the person attacking them has the burden of proving otherwise. *In re Regulation F-22 of Office of Milk Industry, New Jersey, supra*, at pp. 261-262.

[2] Absent any evidence to support appellants' contention, the trial court would thus have had to uphold the validity of Rule 8. Otherwise, administrative action would be perpetually hamstrung by the necessity for time-

consuming and costly procedures in justification of measures seemingly valid on their face. To overcome the presumption appellants introduced the testimony of three expert witnesses who were of the opinion that a number of the tests in Rule #8 are not helpful in determining the correct lenses for a patient. The Board in turn introduced two experts who testified that each of these tests was a necessary part of a minimum examination to determine the correct lenses for a given patient. In their opinion those tests objected to by appellants are likely to reveal pathology or other deviations from the normal and if any such conditions are uncovered, they must be taken into consideration when determining a patient's needs. They also testified that an optometrist, by education and training, is qualified to perform all the tests. Assuming that all the experts were credible, a best we have here a reasonable difference of opinion. Such a difference of opinion cannot justify a court in holding that there has been an abuse of administrative discretion. *City of Newark* v. *New Jersey Turnpike Authority*, 7 N. J. 377, 383 (1951), appeal dismissed 342 U. S. 874, 72 S. Ct. 168, 96 L. Ed. 657 (1951).

[3, 4] Regardless of the assertions that N.J.S.A. 45:12-11(v) is the controlling statutory provision, other sections of the optometry law authorize the Board to promulgate this rule. Subsection (v) of N.J.S.A. 45:12-11 merely provides that at the very least the Board shall prescribe minimum examinations for ascertaining correct lenses. Assuming part of the tests in Rule #8 do not conform to that purpose, N.J.S.A. 45:12-1 and 4 grant the Board the necessary authority. Section 1 defines optometry in part, as the practice of ascertaining departures from the normal in the human eye and section 4 grants the Board wide powers in promulgating rules regulating optometry for the public safety and welfare. Appellants' experts agreed that the

tests under attack might lead to the discovery of certain stages of pathological conditions. This fact was even more emphatically confirmed by experts for the Board. Clearly the discovery of such departures from the normal would be in the interests of the public welfare—it is not enough to say that other procedures would be more appropriate to that end. *Two Guys from Harrison, Inc. v. Furman*, 32 N. J. 199, 218 (1960).

When the Legislature undertook to regulate the practice of optometry it undoubtedly did so in recognition of the specific public interest involved in the treatment of the human eye. *Abelson's, Inc., supra*, 5 N.J., at p. 419. With this consideration in mind, the protective power of the State cloaks the rule. Optometrists will not be unnecessarily limited in their right to exercise their profession. In fact the rule *requires* optometrists to exercise most carefully their professional abilities for the benefit of their patients. The public interest far outweighs the inconvenience caused to an optometrist in complying with the rule. As to appellants' contention that no other profession has been so burdened with details, there is no need to regulate all professions alike. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489, 75 S. Ct. 461, 99 L. Ed. 563, 573 (1955); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610, 55 S. Ct. 570, 79 L. Ed. 1086, 1089 (1935).

The judgment is affirmed without costs.

For affirmance—Chief Justice Weintraub and Justices Jacobs, Francis, Proctor, Hall, Schettino and Haneman—7.

For reversal—*None*.

Appendix B

Mandate of Affirmance by the Supreme Court of New Jersey

This cause having been duly argued before this Court by Mr. Morton Stavis, counsel for the appellants and Mr. William K. Miller, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the decision of the said New Jersey State Board of Optometrists is affirmed without costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the New Jersey State Board of Optometrists to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the 18th day of December, 1961.

JOHN H. GILDEA,
Clerk of the Supreme Court.

FILED
Dec. 18, 1961.

JOHN H. GILDEA,
Clerk.

Appendix C

Decision, Determination and Judgment of the New Jersey State Board of Optometrists (re Albert Weston)

WHEREAS, upon complaint made by Dr. John J. Brown, Inspector, New Jersey State Board of Optometrists, charging and accusing one Albert Weston, the holder of a license to practice optometry, issued by the New Jersey State Board of Optometrists, pursuant to the provisions of Section 45:12 of the Revised Statutes, of violating the provisions of Section 45:12-11 (v) of the Revised Statutes of New Jersey in that the said Albert Weston did violate the provisions of Rule No. 8 of the New Jersey State Board of Optometrists on October 8, 1958, in that he failed to make a complete minimum eye examination of his patient to determine the correct lenses necessary for such patient prior to prescribing for or providing eyeglasses or spectacles to his said patient as defined by said Rule No. 8 of the New Jersey State Board of Optometrists, and he did also violate Section 45:12-11 (s) of the Revised Statutes of New Jersey, in that the said Albert Weston did on the 8th day of October, 1959, violate Rule No. 8 duly promulgated by the New Jersey State Board of Optometrists, and praying that the license issued to the said Albert Weston may be suspended or revoked by the New Jersey State Board of Optometrists; and

WHEREAS, a copy of said Complaint, together with written Notice of hearing having been personally served on the said Albert Weston, on behalf of the complainant on June 26, 1959, as testified to by Dr. John J. Brown, Inspector, New Jersey State Board of Optometrists; and

WHEREAS, the matter came on for a hearing before the New Jersey State Board of Optometrists, at the State

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House Annex, Trenton, New Jersey, on September 24th, 1959, and was continued on October 28, 1959, November 25, 1959 and concluded on December 16, 1959. The defendant appeared in person, together with his counsel, and the said Board having proceeded on said days with the said hearings, to wit: It was stipulated between counsel that the cases concerning Dr. Lionel Weston and Dr. Albert Weston be consolidated for purposes of the presentation of testimony.

Dr. John J. Brown testified that the notice of hearing and complaint were served by him personally upon Dr. Albert Weston on June 26, 1959. He further testified that he was employed as an Inspector of the Board and as such had engaged Dr. Henry A. Brzostowski to call upon Dr. Weston at Dr. Weston's office, for the purpose of having his eyes examined, and to thereafter forward to Dr. Brown the results of the said eye examination. He also testified that Dr. Albert Weston was one of approximately 15 optometrists who were investigated respecting eye examination procedures on the basis of a State-wide spot check; that insofar as he knows, the Board conducted similar hearings involving four other optometrists who were also charged with improperly examining the eyes of their patients.

Dr. Henry A. Brzostowski was sworn and testified that he is a licensed optometrist and practices optometry in Bayonne, New Jersey; that he was engaged by Dr. John J. Brown for the purpose of having his eyes examined by Dr. Albert Weston and that he conducted other investigations at the request of Dr. Brown which were similar to the investigation concerning the defendant. He further testified that he went to the office of Dr. Albert Weston on October 8, 1958 and advised Dr. Weston of his age, the fact that he wore glasses, that he suffered from headaches

and that television appeared blurred. He was then directed to sit in an examining chair and after flashing a projector with a series of letters the witness was asked to identify the letters; then an ophthalmometer was placed before him and he was told to look through a tube; that a phoroptor was placed in front of his eyes and a retinoscopy was performed on both eyes and that a subjective findings examination was performed. The witness stated that his vision was fogged and an astigmatic test on both eyes was performed; that an interpupillary reading and interpupillary distance was taken and an eye glass frame was put in front of his face. He stated that the entire examination of his eyes took between four and five minutes and that he paid Dr. Weston for the examination, lenses and frames. Dr. Brzostowski further testified that the naked visual acuity test performed by Dr. Weston was incomplete; that Dr. Weston failed to perform an opthalmoscopic examination; that no measurement was made of the amplitude of convergence nor was the measurement taken of the amplitude of accomodation; that no phoria or duction findings were taken; that no tests were made for fusion; that no test was made for stereopsis; that color vision tests were omitted; that the defendant failed to perform a visual fields confrontation test and that no detailed reports were made of external findings. The lenses and frames were thereupon offered in evidence. (S-8).

The next witness produced on behalf of the Board was Dr. Frederick W. Sinn, who testified that he is a Professor of physical and geometrical optics on the faculty of the Pennsylvania State College of Optometry; that he has been a Professor since 1947, and that prior to his appointment as a Professor he was associated with the College as an Associate Professor and Assistant Professor since 1933. He stated that he also taught physiological optics

at the College. In testifying, he defined and illustrated the meaning and manner of performing a visual acuity test, an ophthalmoscopic examination, the measurement of the amplitude of convergence and accomodation, the making of phoria and duction findings, the test for fusion, the test for stereopsis, the test for color vision, visual fields, the confrontation test, the necessity and importance of taking a patient's complete history, the taking and noting of external findings, as well as taking the corneal curvature measurements. It was Dr. Sinn's opinion that the performance of the foregoing tests were, in his judgment, the minimum tests required for the determination of the correct lenses necessary for a patient. He also expressed the opinion that if any of the foregoing tests were not performed, that the welfare of the patient would be affected and that the greatest danger of an inadequate examination would be the false confidence that it would give to a patient. He also testified that he performs each of the foregoing tests in every case on all his patients and that the examination takes him one hour. Pursuant to questioning, he described the importance of some of the foregoing tests insofar as they would disclose the presence of eye pathology. He stated that simple glaucoma may be detected by examining the history of a patient and testing the visual fields; that the presence of cataracts would be disclosed by an ophthalmoscopic examination; that a conjunctival condition would be revealed by an external examination and would be considered one of the external findings; that sufficient findings by the use of an ophthalmoscope could disclose a diabetic condition and could also reveal sufficient findings to warrant referring a patient to a physician for an arteriosclerotic condition; that a choked disc indicative of a brain tumor as well as retinal hemorrhaging would be determinable by the use of an ophthalmoscope, and

finally, that external findings could disclose the presence of syphilis.

At the conclusion of Dr. Sinn's testimony, a motion was made on behalf of the defendant to dismiss the complaint on the ground that: The statute involved is invalid and unconstitutional; that Rule No. 8 was not justified by the statute; the Board cannot establish unnecessary tests; the proceedings were purposely directed against the defendant; that the Board denied full examination by the defendant of the witnesses who appeared on behalf of the Board.

After due consideration, the Board denied the motion.

The defendant thereupon offered the testimony of Dr. Irving H. Plain, who testified that he is a licensed physician and specializes as an opthalmologist. He described and defined all the tests that are contained in Rule No. 8 and stated that in his opinion some of those tests are unrelated to the prescription of a lens. In particular, he testified that the corneal curvature measurement by the keratometer is an accessory but is unrelated to a proper prescription; that he found no particular use for a color vision test and therefore only performs the said test with certain individuals, such as a railroad engineer; that external findings, although important, do not affect his prescription unless there are some findings that impede the visual centre or causes opacity in the line of vision; that the visual fields confrontation test is of little value unless plotted accurately, even though this test very often shows up the first sign of a brain tumor or the first signs of some lesions in the optic nerve pathway or in the pituitary region and sometimes glaucoma; that a visual fields test central, after page 40, would not alter his prescription because if he discovered pathology, he would not give the patient a prescription until he got to the cause of the pathology; that an ophthalmoscopic examination does not

somewhat in a refraction, but that he does not obtain his prescription from opthalmoscopic findings, and, finally, that he performs no fusion or stereopsis test unless there is a question of muscular abnormality. However, Dr. Plain conceded that the taking of the patient's complete history is essential; that it is necessary to perform a naked visual acuity test; that it is necessary to determine the external findings; that it is essential to use an ophthalmoscope in each and every case so as to determine the condition of the blood vessels, the condition of the optic nerves and to see whether there are hemorrhages which would show exudates, tumors, or swelling within the eyeball and the condition of the macula; that it is necessary to perform a retinoscopy on a patient and to do muscle tests if there is a muscular abnormality; to perform a phoria test if the eyes are not stable; to make subjective findings; to determine the amplitude of convergence and accomodation and at times to perform tests for fusion and stereopsis; to make a test for color vision on a patient who may be color blind; and he also stated that he performs a visual fields test to determine the presence of glaucoma, brain tumor, meningitis, or a choked disc, but that this latter test is not performed by him on every occasion. Dr. Plain also testified that he would be shocked and horrified if an ophthalmoscope was not used on a patient unless the patient had a glass eye.

The next witness who testified on behalf of the defendant was a Mr. Sidney Kaplan, who operates a Motel in the Trenton area. He testified that he was engaged by G. Henry Weston, Esq., to visit the office of Dr. Sinn in Philadelphia, for the purpose of having his eyes examined. He was also produced for the purpose of testifying that he presented himself at the offices of Dr. Harry Ehrlich, a member of the Board of Optometrists; Dr. Thomas J.

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Surdacki, a member of the Board of Optometrists; at the office of Dr. Phillip Jackman, a member of the Board of Optometrists, as well as the office of Dr. Emanuel C. Nurock, also a member of the Board of Optometrists, for the purpose of having his eyes examined by each of them. An objection to this line of questioning was made as being irrelevant and immaterial, since the sole question for determination before the Board was whether or not the defendant had properly performed the eye examination upon the investigator, Dr. Brzostowski, as required by Rule No. 8. The objection to Mr. Kaplan's testimony was sustained. In addition, defendant's counsel was informed that if he had proof of alleged violations of the optometry statute by any of the members of the Board or of Dr. Sinn, he should file a complaint with the Board and that the Board would take proper action thereon. The defendant's attorney renewed his motion to dismiss the complaint, which was denied.

Now, Therefore, be it Resolved, on this 24th day of February, 1960, that the New Jersey State Board of Optometrists finds from all the evidence that Dr. Albert Weston failed to make a complete minimum examination of his patient on October 8, 1958, prior to prescribing for or providing eyeglasses or spectacles as he was required to do by virtue of the provisions of R.S. 45:12-11 (v) and Rule No. 8 of the New Jersey State Board of Optometrists. The testimony is uncontradicted that when Dr. Weston examined the eyes of his patient prior to prescribing for or providing eyeglasses or spectacles on October 8, 1958, that he failed to perform a complete naked visual acuity test; that he failed to perform an ophthalmoscopic examination; that he omitted to measure the amplitude of convergence as well as the amplitude of accommodation; that he failed to take phoria and duction findings; that he failed

to make a test for fusion; that he performed no test for stereopsis; that he failed to make any test for color vision; that he failed to perform a visual fields confrontation test and neglected to make a detailed report of the external findings, thereby violating the provisions of R.S. 45:12-11 (v) and R.S. 45:12-11 (s) as well as the requirements of Rule No. 8.

It is pertinent to observe that the defendant did not take the witness stand to affirm or deny the charges or the testimony which accused him of performing an incomplete eye examination on Dr. Brzostowski. Furthermore, the defendant even failed to perform those tests which his own witness considered to be of the utmost importance. In this context, Dr. Plain's statement that "he would be shocked and horrified if an ophthalmoscope was not used on the patient" is especially significant since the proofs revealed that Dr. Weston did not use an ophthalmoscope when he examined his patient. The defendant's failure to properly examine his patient's eyes provides an apt illustration for the necessity of the rule involved in this case.

During the course of the hearing defendant's counsel asserted that the proceedings herein were purposely directed against his client. However, the Board's records disclose that seventeen separate spot check investigations, regarding the alleged violation of Rule No. 8, were conducted throughout the State. The records also show that the investigations were the basis for formal hearings which were conducted by the Board against four optometrists.

Dr. Plain, the defendant's witness, testified with respect to the advisability of performing all the tests set forth in Rule No. 8. It was his opinion that the performance of all of those tests was unnecessary. However, this testimony is not persuasive since it represents Dr. Plain's

personal opinion. Suffice it to say that Dr. Plain's personal viewpoint cannot override the clear legislative pronouncement on the subject.

The provisions of Section 45:12-11 (v) of the Revised Statutes, together with the requirements of Rule No. 8 of the New Jersey State Board of Optometrists, were promulgated for the health, welfare and safety of the public. The failure of an optometrist to perform a complete and thorough eye examination, as described in Rule No. 8, does not extend to the patient that degree of care and safety to which he is entitled. Safeguarding the patient from harm and promoting the patient's security and well-being are of paramount importance. (*Abelson's Inc. v. N. J. State Board of Optometrists*, 5 N.J. 412.) Accordingly, after a careful and complete evaluation of all the testimony presented to this Board on behalf of the defendant, as well as that of the Board, the New Jersey State Board of Optometrists unanimously finds the defendant, Albert Weston, O.D., guilty, as charged in the complaint, of having violated the provisions of R.S. 45:12-11 (v) and R.S. 45:12-11 (s), together with the provisions of Rule No. 8 of the New Jersey State Board of Optometrists and hereby suspends his license to practice optometry in the State of New Jersey for a period of two months, commencing on Monday, April 1, 1960 and terminating on Wednesday, June 1, 1960.

S. Benjamin Sobel O.D.

Harry Ehrlich O.D.

Thomas J. Serbacki O.D.

Phillip Jackman O.D.

Emanuel C. Nyrock O.D.

(SEAL)

Appendix D

Decision, Determination and Judgment of the New Jersey State Board of Optometrists (re Lionel Weston)

WHEREAS, upon complaint made by Dr. John J. Brown, Inspector, New Jersey State Board of Optometrists, charging and accusing one Lionel Weston, the holder of a license to practice optometry, issued by the New Jersey State Board of Optometrists, pursuant to the provisions of Section 45:12 of the Revised Statutes, of violating the provisions of Section 45:12-11 (v) of the Revised Statutes of New Jersey in that the said Lionel Weston did violate the provisions of Rule No. 8 of the New Jersey State Board of Optometrists on February 20, 1959, in that he failed to make a complete minimum eye examination of his patient to determine the correct lenses necessary for such patient prior to prescribing for or providing eyeglasses or spectacles to his said patient as defined by said Rule No. 8 of the New Jersey State Board of Optometrists, and he did also violate Section 45:12-11 (s) of the Revised Statutes of New Jersey, in that the said Lionel Weston did on the 20th day of February, 1959, violate Rule No. 8 duly promulgated by the New Jersey State Board of Optometrists, and praying that the license issued to the said Lionel Weston may be suspended or revoked by the New Jersey State Board of Optometrists; and

WHEREAS, a copy of said Complaint, together with written Notice of hearing having been personally served on the said Lionel Weston, on behalf of the complainant on June 17, 1959, as testified to by Dr. John J. Brown, Inspector, New Jersey State Board of Optometrists; and

WHEREAS, the matter came on for a hearing before the New Jersey State Board of Optometrists, at the State

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House Annex, Trenton, New Jersey, on September 24th, 1959, and was continued on October 28, 1959, November 25, 1959 and concluded on December 16, 1959. The defendant appeared in person, together with his counsel, and the said Board having proceeded on said days with the said hearings, to wit: It was stipulated between counsel that the cases concerning Dr. Lionel Weston and Dr. Albert Weston be consolidated for purposes of the presentation of testimony.

Dr. John J. Brown testified that the notice of hearing and complaint were served by him personally upon Dr. Lionel Weston on June 17, 1959. He further testified that he was employed as an Inspector of the Board and as such had engaged Dr. Rudolph S. Domino to call upon Dr. Weston at Dr. Weston's office, for the purpose of having his eyes examined, and to thereafter forward to Dr. Brown the results of the said eye examination. He also testified that Dr. Lionel Weston was one of approximately 15 optometrists who were investigated respecting eye examination procedures on the basis of a State-wide spot check; that insofar as he knows, the Board conducted similar hearings involving four other optometrists who were also charged with improperly examining the eyes of their patients.

Dr. Rudolph S. Domino was sworn and testified that he is a licensed optometrist and that he practices optometry at his office in Edison, New Jersey; that he was engaged by Dr. John J. Brown to present himself at the office of the defendant for the purpose of having his eyes examined and to thereafter forward a report of said eye examination to Dr. Brown; that he subsequently appeared at the office of the defendant, Dr. Lionel Weston, on February 20, 1959; that he informed the defendant of his age and complained of frequent headaches and ocular dis-

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comfort; that the defendant thereupon directed him to sit behind a phoroptor and to look at the wall and to observe a green dot, and the defendant then proceeded to take a static examination, after which Dr. Domino's vision was blurred by the defendant and a green and red target was projected across the room; that the defendant started the subjective examination and placed a cylindrical finding in the phoroptor, thereupon refining it with the cross-cylindrical finding; that he then paid for the eye examination and glasses, and that the examination lasted about 10-15 minutes. The receipts of payment to the defendant were offered in evidence, together with the glasses that were given to Dr. Domino (8-5). Dr. Domino further testified that the defendant failed to measure the naked visual acuity of his eyes; failed to make an ophthalmoscopic examination of his eyes; failed to perform or take the corneal curvature measurements of his eyes; that he made no measurement of the amplitude of convergence nor did he measure the amplitude of accomodation; that he failed to take phoria and duction findings; that he made no test for either stereopsis or for color vision; that he failed to perform a confrontation test or to perform a test of the visual fields of his eyes; that he failed to take his complete history and failed to make a detailed report of the external findings. On cross examination, the witness described the purposes and nature of the tests and stated that he himself performs each test on all his patients, with the exception of stereopsis in the case of a patient who has but one eye. Finally, he testified that the tests usually take him from one-half hour to three-quarters of an hour to complete.

* * *

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Note: At this point the Board repeated the same language as appears in its decision *re. Albert Weston, supra*, p. 11a to p. 14a.

The next witness who testified on behalf of the defendant was a Mr. Sidney Kaplan, who operates a Motel in the Trenton area. He testified that he was engaged by G. Henry Weston, Esq., to visit the office of Dr. Sinn in Philadelphia, for the purpose of having his eyes examined. He was also produced for the purpose of testifying that he presented himself at the offices of Dr. Harry Ehrlich, a member of the Board of Optometrists; Dr. Thomas J. Surdacki, a member of the Board of Optometrists; at the office of Dr. Phillip Jackman, a member of the Board of Optometrists, as well as the office of Dr. Emanuel C. Nurock, also a member of the Board of Optometrists, for the purpose of having his eyes examined by each of them. An objection to this line of questioning was made as being irrelevant and immaterial since the sole question for determination before the Board was whether or not the defendant had properly performed the eye examination upon the investigator, Dr. Domino, as required by Rule No. 8. The objection to Mr. Kaplan's testimony was sustained. In addition, defendant's counsel was informed that if he had proof of alleged violations of the optometry statute by any of the members of the Board or of Dr. Sinn, he should file a complaint with the Board and that the Board would take proper action thereon. The defendant's attorney renewed his motion to dismiss the complaint, which was denied.

Now, THEREFORE, BE IT RESOLVED, on this 24th day of February, 1960, that the New Jersey State Board of Optometrists finds from all the evidence that Dr. Lionel Weston failed to make a complete minimum examination of

his patient on February 20, 1959, prior to prescribing for or providing eyeglasses or spectacles as he was required to do by virtue of the provisions of R.S. 45:12-11 (v) and Rule No. 8 of the New Jersey State Board of Optometrists. The testimony is uncontradicted that when Dr. Weston examined the eyes of his patient prior to prescribing for or providing eyeglasses or spectacles on February 20, 1959; that he failed to measure the naked visual acuity of his patient's eyes; that he failed to make an ophthalmoscopic examination; that he failed to perform or take the corneal curvature measurements of his eyes; that he made no measurement of the amplitude of convergence nor did he measure the amplitude of accommodaiton; that he failed to take phoria and duction findings; that he made no test for either stereopsis or for color vision; that he failed to perform a confrontation test of the visual fields of his eyes; that he failed to take the patient's complete history and neglected to make a detailed report of the external findings, thereby violating the provisions of R.S. 45:12-11 (v) and R.S. 45:12-11 (s) as well as the requirements of Rule No. 8.

It is pertinent to observe that the defendant did not take the witness stand to affirm or deny the charges or the testimony which accused him of performing an incomplete eye examination on Dr. Domino. Furthermore, the defendant even failed to perform those tests which his own witness considered to be of the utmost importance. In this context, Dr. Plain's statement that "he would be shocked and horrified if an OPHTHALMOSCOPE was not used on the patient" is especially significant since the proofs revealed that Dr. Weston did not use an ophthalmoscope when he examined his patient. The defendant's failure to properly examine his patient's eyes provided an apt illustration for the necessity of the rule involved in this case.

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During the course of the hearing defendant's counsel asserted that the proceedings herein were purposely directed against his client. However, the Board's records disclose that seventeen separate spot check investigations, regarding the alleged violation of Rule No. 8, were conducted throughout the State. The records also show that the investigations were the basis for formal hearings which were conducted by the Board against four optometrists.

Dr. Plain, the defendant's witness, testified with respect to the advisability of performing all the tests set forth in Rule No. 8. It was his opinion that the performance of all of those tests was unnecessary. However, this testimony is not persuasive since it represents Dr. Plain's personal opinion. Suffice it to say that Dr. Plain's personal viewpoint cannot override the clear legislative pronouncement on the subject.

The provisions of Sec. 45:12-11 (v) of the Revised Statutes, together with the requirements of Rule No. 8 of the New Jersey State Board of Optometrists, were promulgated for the health, welfare and safety of the public. The failure of an optometrist to perform a complete and thorough eye examination, as described in Rule No. 8, does not extend to the patient that degree of care and safety to which he is entitled. Safeguarding the patient from harm and promoting the patient's security and well-being are of paramount importance. (*Abelson's Inc. v. N. J. State Board of Optometrists*, 5 N.J. 412). Accordingly, after a careful and complete evaluation of all the testimony presented to this Board on behalf of the defendant, as well as that of the Board, the New Jersey State Board of Optometrists *unanimously finds the* defendant, Lionel Weston, O.D., guilty, as charged in the complaint, of having violated the provisions of R.S. 45:12-11 (v) and R.S. 45:12-11 (s), together with the provisions of Rule No. 8 of the New

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Jersey State Board of Optometrists and hereby suspends his license to practice optometry in the State of New Jersey for a period of two months, commencing on Monday, April 1, 1960 and terminating on Wednesday, June 1, 1960.

S. Benj. Sobel, O.D.

Harry Ehrlich, O.D.

Thomas J. Surdacki, O.D.

Phillip Jackman, O.D.

Emanuel C. Nurock, O.D.

(Seal)

Appendix E

Order of Remand by the Supreme Court of New Jersey, dated December 19, 1960

It is Ordered that this matter be referred to Judge FRANK J. KIXGFIELD for taking of testimony and findings of facts upon the following questions:

"(1) The validity of Rule 8 of the State Board of Optometry; and

(2) Whether or not there has been discrimination in the enforcement of said rule.

And it is further Ordered that Judge KIXGFIELD return the evidence and his findings of facts to this Court.

By the Court

JOSEPH WEINTRAUB,
Chief Justice.

(Filed December 19, 1960.)

JOHN H. GILDEA
Clerk

Appendix F

Oral Opinion of Judge Kingfield, Superior Court of New Jersey, Law Division

The Court: This matter was referred to me for the taking of testimony and the finding of facts upon two questions, one with respect to the validity of Rule 8 of the State Board of Optometry; and, two, whether or not there has been discrimination in the enforcement of the rule, and I was ordered to return the evidence and my findings of fact to the Supreme Court.

The matter involving the question of discrimination has been disposed of by stipulation of the parties, involves a dismissal of the charges against the Westons and lifting of their suspension. That leaves for determination the sole issue, the reasonableness of Rule 8.

The evidence that has been presented, to briefly review it, we had the testimony on the part of the appellants of three doctors, Dr. Plain, an ophthalmologist, who testified before the Board and likewise testified at this proceeding, and from his testimony it appears that all of the prescribed tests in this Rule did not pertain to refraction. As he stated, the basic tests for this purpose were to obtain the symptoms of the patient, make the naked visual acuity test, the gross inspection, the cover test, and the retinoscopy. He also testified that some of the tests were to discover muscular deficiencies and others to discover pathology, and finally, that the color test had nothing to do with the prescription of the lens.

Dr. Plain likewise felt that optometrists were not qualified to administer tests to discover pathology, and that there was a danger in permitting optometrists to administer such tests, and that they would not be able to discover incipient conditions in the periphery of the retina. The

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fact that optometrists were not permitted to dilate the pupils, their examination permitted them only to see about 20% of the eye. And it was his conclusion that the administration of the number of tests that should be performed under this Rule in effect lulled the patient into a false sense of security. Although he also admitted that as the result of these tests which were made by optometrists, that there had been cases of referral to him where optometrists had discovered pathological conditions.

Dr. Plain likewise felt that a patient is entitled to the best examination he can get, and also that there be a standard of some kind. Although his ultimate opinion was that the tests for muscular deficiency be eliminated, unless there be indications that the tests be administered, and also that the confrontation test and the color test be eliminated.

Dr. Fonda, who also testified for the appellants, had been an optometrist and is now an ophthalmologist, and his testimony, after he reviewed the tests one by one, concluded that a number of them were unnecessary for prescribing lenses, also concluded that the optometrist was not qualified for making a pathological examination.

And the last witness who testified for the appellants was Dr. Moskowitz, also in ophthalmologist, and his opinion in effect concurred with the opinion of the other two experts who were produced by the appellants. He said it was unnecessary to measure corneal curvature, and that he doesn't make phoria and duction tests unless the cover test indicates abnormality.

Now, going to the experts who testified for the Board. Dr. Curcio, an ophthalmologist who was formerly an optometrist, went over the tests one by one, and he considered all the tests to be necessary, and that all the tests should be administered by an optometrist. He likewise testified

that optometrists were taught pathology; that they had clinical experience with it; and that they were able to recognize pathological conditions in the eye. He also admitted that some of the tests, for example color vision, fusion, and stereopsis did not figure in the numerical aspect of the vision for the lens. And he also admitted that optometrists are looking for pathological conditions when they conduct the ophthalmoscopic examination and the visual fields examination.

Dr. Shlaifer, who testified for the Board as an expert, is an optometrist and practices as such, and also is associate professor in the Pennsylvania State College of Optometry. Like the other experts, he went over the tests one by one and considered all of them necessary to be administered. He likewise testified that pathology is taught at optometry schools, and that graduates from such schools are trained to recognize pathology.

It was Dr. Shlaifer's opinion that all the tests as set forth in this Rule are of assistance in the evaluation of his final decision as to the nature of the lens to be prescribed.

It is obvious at this point that there appears to be a decided difference of opinion by the experts as to the number of tests to be required.

The statute which defines optometry is set forth in R.S. 45:12-1 wherein it is set forth that optometry is declared to be a profession, and, "The practice of optometry is defined to be the employment of objective or subjective means, or both, for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its power of vision, and adapting lenses or prisms for the aid thereof." And then it sets forth, further on in the paragraph, that there is used testing appliances for the purposes of measuring the powers

of vision or diagnose any ocular deficiency or deformity, visual or muscular anomaly of the human eye, or prescribe lens, and so forth, for correction and relief thereof.

The Board was empowered to pass rules. And then we go to R.S. 45:12-11 that, "The Board shall have the power, and it is hereby made its duty, to refuse to grant, to revoke or to suspend * * * any license to practice optometry * * * for the following causes:—" Then that brings us to section (v) of that section, which sets forth: "Prior to prescribing for or providing eyeglasses or spectacles a complete minimum examination shall be made of the patient to determine the correct lenses necessary for such a patient. The requirements of such minimum examination shall be defined by rule or regulations of the New Jersey State Board of Optometrists."

The appellants contend that the Board does not have the power to tell a professional man exactly what to do; that it can determine whether he is competent or qualified, but that there should be allowed room for the exercise of his professional judgment. The appellants also contend that Rule 8 goes beyond what the statute purports to authorize, namely, as the appellants contend, that the statute authorizes the Board to establish minimum examination for the purpose of prescribing lenses. The appellants by their experts have pointed out that some of the provisions are burdensome and unnecessary and have nothing to do with the prescription of glasses, and as I have set forth, the color vision, and that a number of tests are to determine the existence of muscular deficiency and pathology, and as the experts for the appellants have testified, that all the tests listed are not necessary to prescribe glasses.

On the other hand, the Board takes the position that the purpose of the rules is to maintain a high standard within

the profession and improve it, if it possibly can be improved. And, as I pointed out before that the experts for the appellants and the experts for the Board disagreed as to the tests which are necessary to be administered by the optometrists.

We next might consider the fact that we are dealing with a profession. Optometry has been classified by the Legislature as a profession, and as such is subject to a degree of self-regulation. In the case of *Abelson's Inc.*, v. *N. J. State Board of Optometrists*, 5 N.J. 412 (Sup. Ct. 1950), the Court said:

> "The practice of optometry involves, not alone the measurement of the powers of vision, but also diagnosis and prescription for the revealed ocular deficiency or deformity or visual or muscular anomaly of the eye; • • • ."

I think it should be likewise clear that R.S. 45:12-11 (v) and Rule 8 were enacted for the health, welfare and safety of the public. All the experts, and I think everybody involved in this litigation concede that a patient who visits the office of an optometrist has the right to expect a thorough and complete eye examination as the result of such a visit.

The purpose, I think, and the intent of the statute and the rule, and the nature of the profession indicate that the discovery of pathology is included within the scope of the responsibility and the minimum examination to be administered by an optometrist. I think it has been established that graduates of colleges teaching optometry receive training in ocular anatomy and pathology, and also the means of making such diagnosis.

Now, looking to the power of the Court to safeguard the welfare of the public, the Legislature has a broad discre-

tion in the choice of means to serve the public interest of the public generally, subject only to constitutional restraints and the rule of reasonableness; that if the measures invoked by the Legislature tend to serve a legitimate interest, that the wisdom of the course taken is ordinarily not one for the courts. And it might be expressed in a different way; that when the subject lies within the police power of the State, that the debatable questions as to the reasonableness are not for the courts but for the Legislature which is entitled to form its own judgment.

And likewise, I think it is well established that the Legislature may enact a statute which sets forth in broad design its intended purpose and leaves the detailed implementation of that policy to an administrative agency, and a determination of the standards which an administrative agency sets forth is governed by an examination of the entire statute.

Then, finally, I think it is well established that there is a strong presumption that a statute is constitutional, and a legislative act will not be declared void unless its repugnancy to the Constitution is clear beyond a reasonable doubt, and that this standard likewise can be applied to the determination of administrative rules.

This brings us now to a consideration of the questions that the litigation poses. First, should a profession such as this be so regulated by a rule which affirmatively directs a member of the profession in the details of the performance of his duty; or it might also be expressed, is it an unreasonable invasion of his right to practice a profession if there is eliminated the exercise of discretion?

There is no doubt about it, we have been raised in this country to abhor regimentation, to be told precisely what to do. The question, of course, still exists: is this provision, even with the adoption of the rule with the 14 tests

to be imposed, such a regimentation as to preclude a member of the profession from the exercise of his discretion?

There is no doubt about it, that there probably isn't another profession which is so regulated. And even throughout the United States, the states which so regulate optometry are few in number, and I believe it is true that no state quite regulates optometry like New Jersey does.

Optometry, as a profession, has characteristics which I believe differentiate it from any other profession. The practice of law, for example, is unlimited in the sense that a lawyer has discretion within the limits of law to do what he sees fit; likewise in medicine. But the characteristic of this profession is that it only has the power to do certain things. There is a point beyond which it cannot go. For example, it doesn't have the power to even put drops in an eye to dilate a pupil. It can't treat pathological conditions or other deficiencies in the eye. It only has the power to recognize them. And if conditions like this are recognized, that they be referred to an ophthalmologist. So, with a situation like that, it seems to me that there has to be some sort of a rule or standard. Even Dr. Plain, who testified for the appellants, says that there should be a standard, that there should be a certain number of minimum tests.

The disagreement on the part of the experts is that the experts on the part of the appellants said you should only make the tests which relate to the refractive nature of the examination; you shouldn't do any others. The experts on the part of the Board take the position that the tests should go beyond that; that there is a duty imposed upon optometrists to recognize pathology and muscular deficiencies since they are trained to do so, at least in schools today.

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So, if you arrive at that position that there should be some rule or standard, and have a difference of opinion on the part of the experts as to the nature of that rule or standard, it seems to me we have to conclude that the Board has the power to establish a rule setting up requirements for a minimum examination.

Now, this brings us to the second question which should be propounded: is the rule, as set forth, reasonable in that a number of tests might be said to go beyond the statutory power or direction which, as we all realize, is that the primary function of an optometrist is to determine the correct lenses necessary for a patient? We did have in the *Abelson's* case that the practice of optometry is not alone for the measurement of the powers of vision, but also that there is the power to diagnose for revealed deficiencies or deformities.

I think that the statute is such that a rule which contains within it tests dealing with the discovery of pathology or muscular abnormalities, even though they might not have anything to do with refraction, is within the scope of the statute. The primary purpose certainly, which every one of us concedes is the rule of the profession, is to do the best for the patient that reasonably can be done, and that the purpose is for the health and welfare of the public.

I am not ready to admit that this rule is unreasonable solely on the ground that it goes beyond the simple power on the part of optometrists to determine what lenses are suitable for a patient. It seems to me that optometrists should be given the right to recognize pathology. Frankly, I think it would be in a sense criminal if all they were trained to do and all that they did was simply put a pair of glasses on a person. It seems to me that if they are trained to recognize these conditions, and when they find

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them, that they be referred. Certainly, the public is the gainer for that.

I do not quite agree with Dr. Plain and Dr. Fonda that the administration of these tests lull the public into a false sense of security. There is no doubt about it, optometrists might not discover all of the deficiencies within an eye in the course of an examination, but certainly within the scope of their power they should have the right to diagnose and tell a patient what they find; at least reach a point of determining whether or not they should go on with the examination.

I think it might also be pointed out that despite the testimony of Dr. Plain and Dr. Fonda stating that harm to the general public is occasioned by the examination by optometrists as to pathological conditions, that there was not a specific case of harm shown.

It seems to me that even though the Rule sets forth a number of requirements, that it doesn't entirely deprive an optometrist from exercising his judgment in arriving at a prescription for lenses. There is no doubt about it, the tests to be administered might possibly be considered a form of regimentation, but there still is a measure left for him to exercise a judgment as to the nature of lens to be given to a patient.

So, we arrive at this point, that if a board in its discretion determines that a series of tests are necessary, and even though some of those tests deal with pathology, a board should have the right to exercise its opinion. After all, that is what the board is there for, to regulate this profession.

Frankly, I don't think that the fact that some of the tests go beyond refraction is enough to have a court interfere and say this rule is on its face unreasonable. I feel that for a court, particularly a court at this level to do

so would simply be substituting its opinion for that of the Board. We have a Board which has determined that this is the way it should be: this is what we think it should be. Frankly, I don't think that the case has been made out that the rule is unreasonable in that it violates constitutional requirements.

There remains only one other question we might pose with relation to this case, and that might be expressed as follows: Is the rule unreasonable in that the failure to perform each and every test necessarily results in a mandatory suspension or revocation of a license to practice optometry? My comments with respect to this are these; that, first of all, this rule does not guarantee competence. It sets forth a number of tests to be administered. The tests can be done in a slovenly manner and yet I suppose it could be said that the rule has been complied with. Frankly, I prefer the rule as set forth in Texas. But, again, it would be simply the substitution of my opinion for that of the Board. The experts have disagreed. And I feel that the Board is entitled to its independent judgment. After all, the Board lives with this problem day in and day out. And I suppose, as this case has disclosed, that up to now, at least, this rule has not been complied with by possibly a number of optometrists. However, I think this litigation will probably do more to bring this problem into its proper perspective. It is a strange thing that the validity of this rule has not heretofore been determined by the courts. And it seems to me that this litigation, if it serves no other purpose, will bring that issue to a head. And it is something that certainly seems to me that if I were a member of the Board, I would want a final court adjudication as to the validity of this rule. And once that has been established, if it will be established, upon the final adjudication of this problem, since it is going

to the Supreme Court after it leaves this court, I feel that this rule should be strictly enforced.

I will admit, too, that with that provision that the failure to perform any one of those tests results in a mandatory suspension does have within it the possibility of it being used in a discriminatory manner. But I feel, however, that once the validity is established, then there is no reason why it shouldn't be lived up to, and why it shouldn't be enforced. So, despite the fact that I might not particularly care for that phase of the statute, that is not for me to say; that is for the Legislature.

So, in conclusion, it is my opinion that the rule as such is a valid and legal regulation adopted by the Board under the power granted to so adopt a rule by the Legislature of the State.

(Hearing closed)

Appendix G

Extract from Brief before Supreme Court of New Jersey Summarizing Expert Testimony

APPELLANTS' EXPERTS:

Dr. Irving H. Plain (Tr. 6-7) is an outstanding ophthalmologist. He is a Diplomate of the American Board of Ophthalmology; he has widespread hospital connections; and he is the Ophthalmologist of the Newark Health Department. His training and experience in the field of eye pathology are unusual and impressive (Tr. 32-33). At the hearing before the Board even counsel for the Board said:

> "I have no quarrel with the doctor's qualifications. As a matter of fact, he is an eminent opthalmologist. Of that there is no doubt in my mind." (A152a-19)

Dr. Donald A. Fonda (Tr. 108 to 109) is also an opthalmologist of substantial repute. He now teaches as an Assistant Clinical Professor of Ophthalmology at New York University in addition to practicing his profession. In an earlier period of his life he was an optometrist.

Dr. Herbert L. Moskowitz (Tr. 476 to 477) is an opthalmologist who in the course of his career had for 19 months been officer in charge of the Eye Clinic at the Scott Air Force Base in Illinois. For the past two years he has served as Secretary and subsequently Chairman of the Eye, Ear, Nose & Throat Section of the New Jersey Academy of Medicine.

THE BOARD'S EXPERTS:

Dr. Michael Curcio (Tr. 297 to 298), like Dr. Fonda, had been an optometrist and subsequently became a medical

practitioner and in due course an ophthalmologist. He teaches at the Hahnemann Medical College.

Dr. Arthur Shlaifer (Tr. 397 to 398) is an "optometrist and an optometric educator" (Tr. 397-13). He teaches at the Pennsylvania State College of Optometry.

SUMMARY OF EXPERT TESTIMONY

What at first glance appears to be an impenetrable cloud of technical terminology become quickly dissipated when the testimony of the various experts is analyzed. Indeed, it develops that in substantial areas there is agreement among the various experts and in those areas where there is disagreement the issues can be precisely stated and determined and are readily justiciable.

Analysis of the 15 tests reveals that they fall into four quite separate aspects of the examination of the eye:

1. *Examination to determine the refractive error of the eye*, i.e., the extent to which the eye cannot focus clearly upon an object. This determines what lens is necessary to achieve correct focusing.

Two steps of the examination deal with refractive error: retinoscopy and subjective findings (Tests 6 and 9). These were defined by Dr. Plain as follows:

> "Static retinoscopy is a test where one, with the use of the retinoscope, the examiner tells by the movement of the light on the cornea and the lens and the retina, that is its reflection from the patient's eye of this light back to the examiner's eye, he can tell whether the patient is farsighted, nearsighted, and by the use of lenses in conjunction with this he can pretty accurately tell the refractive error of this patient." (Tr. 10, 5-13)

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"A subjective finding is that which the patient gives you. By way of example, I may do a complete and I feel proper eyeglass or refraction test, and feel that the patient needs a plus 5 lens, by way of example; and yet when I try this on the patient's eye in varying functions, this patient may make a great objection to this strength of lens. Therefore, in answer to his subjective response, I will either increase the strength of the lens or decrease the strength, because the objective finding does not always correspond to the patient's feeling." (Tr. 11-25 to 12-9)

There is no disagreement among the doctors as to the meaning or significance of these examinations. See Dr. Fonda (Tr. 113 to 115); Dr. Curcio (Tr. 320 to 325); Dr. Shlaifer (Tr. 412 and 416 to 417).

As a practical matter these two tests are the basic tools from which any optometrist or ophthalmologist would determine what lens is needed to bring the eye into proper focus.

2. *Examination to determine the muscular condition of the eye*, i.e., the muscle control over the movement of the eyes separately and in relationship to each other. Abnormal muscular condition is to some extent correctible by lenses.

The specific tests here involved include amplitude of convergence and accommodation, and phoria and duction findings (Tests 7 and 8).* These were all defined precisely by Dr. Plain as follows:

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* Fusion and stereopsis are to some extent affected by muscular balance. To that extent the condition would be discerned by the muscle tests dealt with in this section. The non-muscular aspects of fusion and stereopsis are dealt with in the sub-sequent section of this brief.

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(a) Amplitude of convergence and accommodation.

"This tells the power of the eyes to be used in a position where the eyes have to move internally, in toward the nose. That is convergence. * * * Accommodation is a test used in conjunction with this. It tells how this patient can focus principally at near. When the object approaching him becomes double, we know he has reached the limit of his accommodation [*sic;* the last word ~~should~~ read 'convergence']." (Tr. 10-18 to 25)

(b) Phorias and ductions.

"A phoria is a condition where the eyes look normal and uncrossed on gross examination. That is, they are both parallel. They are not crossed. However, I must tell you the condition before I can describe the test. In phoria, this patient is using a great deal of subconscious effort to keep his eyes straight or to focus in conjunction one with the other. In a phoria test, we first see how each eye works separately by the cover test, then we knew we have a phoria to begin with. If one eye under the cover, that is the eye which is covered is in a position of rest, it will give up and turn either inward or outward * * *

"Now, there may be a phoria where the eyes would have a tendency [of] * * * being on a higher level or one on a lower horizontal level; either vertically or horizontally.

"In a duction test, one tests the individual functions of how the eye moves outward, inward, upward and downward, and also in the oblique positions." (Tr. 11-2 to 23)

The Board's Doctors were in agreement as to their understanding of these tests. See Dr. Curcio's testimony (Tr. 321 to 324 and 326 to 327) and Dr. Shlaifer's testimony (Tr. 414 to 416).

There was, however, a basic disagreement between the appellants' experts and at least one of the Board's experts (Dr. Shlaifer), as follows: The tests noted above in Rule 8 are tests for *measuring* muscular imbalance to determine the amount of correction which may be needed. Dr. Plain emphasized that before *measuring* muscular imbalance he first determines whether there is any such imbalance. His own language clearly sets forth his procedure:

> "You look at the eyes to see how they are pointing; are they parallel when they look straight ahead; do they move in a parallel fashion when the patient looks up and down or to the side; or, is this patient very obviously crosseyed, does he have a strabismus. This can be seen on gross inspection. Or does he have an abnormal quiver of his eyeball, nystagmus. This one sees on gross inspection.
>
> . . . .
>
> "Then one does the cover test.
>
> . . . .
>
> "Now, let us assume this patient does all of these movements in a parallel and synchronized fashion with both eyes open. As I said, he might have a phoria where he is unconsciously using his fusion power to keep these eyes balanced. What do we do? We do the cover test. And this brings out any latent muscle abnormality, as well as gross muscle abnormalities. We cover one eye and we ask the patient to look at a light or object with

the uncovered eye. Now, the eye that is covered no longer has the incentive to focus, whereas the uncovered eye is looking at the object. The covered eye, without any incentive to focus, will assume its natural position, not the one which it is subconsciously straining to maintain, but it will assume its position of rest.

* * *

"Now, if you immediately move the card away from this second covered eye, the patient is still fixing on this object, you will see the eye make a movement of regress. It will, if it was an esophoria, jump out to focus properly. And the same would hold with an exophoria where the eyes have a tendency to turn out if they are not forced subconsciously to be parallel or in one of the vertical deviations, in a hyperphoria. This cover test will do all of this. And it will determine whether one should go on with more delicate muscle tests." (Tr. 17-2 to 18-24)

Dr. Plain was emphatic that there was no point in doing additional muscle tests if no abnormality appeared from the gross inspection or the cover test.

"It would be, in my opinion, a waste of my time and the patient's time, and a fatiguing thing which might throw my final prescription off if it were done without any indication." (Tr. 19-8 to 11)

Dr. Fonda was in complete accord (Tr. 119 to 120).

Dr. Curcio attempted strenuously to argue against the forthright approach of Dr. Plain (Tr. 367 to 375) but when finally pinned down could only state that he believed a vertical imbalance might not be revealed by the gross examination and cover test that Dr. Plain had outlined (Tr. 375-

10). He also admitted that in most instances he would not correct a minor aberration that he might discover from detailed measurements, but which had not been revealed by the cover test and the gross examination (Tr. 370-25).

Dr. Shlaifer also disagreed with Dr. Plain but had to admit that an eye examination as outlined by probably one of the most outstanding ophthalmologists in the world, Duke-Elder*, was in accord with the practice of Dr. Plain and did not include as a matter of routine the making of the muscle measurements decreed in Rule 8 unless indicated by symptoms or the results of other gross tests (Tr. 457-10).

Dr. Moskowitz added the interesting fact that at the Eye Clinic of the Scott Air Force Base the practice was exactly as outlined by Dr. Plain (Tr. 478 to 482) with the single exception of applicants for pilot's license (Tr. 482-3).

3. *Examination to discover factors with respect to the eye which are not correctible, do not enter into the lens prescription, and do not involve pathology.*

This category includes a number of unrelated tests (Nos. 5, 10, 11, 12):

(a) Color vision. All of the ophthalmologists agreed that nothing can be done to correct this condition (Dr. Plain,

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* The volume referred to was first presented at the hearing before the Board of Optometrists with the following introduction by counsel for the Board:

"I come to an author which I understand in my own fashion represents one of the world's outstanding ophthalmologists. I think I have so been informed and I refer now to Sir Stewart Duke-Elder. Am I correct in that description, that he is one of world's outstanding experts in the field of ophthalmology?" (A204a-27 to 32)

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Tr. 23-10; Dr. Fonda, Tr. 121-123; Dr. Curcio, Tr. 343-22). Dr. Curcio thought it important that the patient should have the information (Tr. 348-13), but Dr. Fonda's experience was that most people who are color-blind know it: "A Third Grade child usually knows he is color-blind." (Tr. 121-25).

Dr. Shlaifer (whose training and experience, it will be observed, was the least of all the doctors) apparently disagreed. He has developed a novel theory by which he seeks to relate color vision with refractive error (Tr. 421-7), but even he had to acknowledge that, except for those who had read his article on this subject, optometrists and ophthalmologists would not be expected to assume any relationship between color vision and refraction (Tr. 439-16).

Dr. Moskowitz, testifying after Dr. Shlaifer, had never read the article and was of the view that there was no relationship between these facts (Tr. 483-2).

(b) Corneal curvature measurement. This was described by Dr. Plain as follows:

> "It gives you the curve of the cornea, and it tells you whether all the curves are equal in their radius or whether one curve is greater than another. If it is, then we have the condition of astigmatism. However, this only gives you the astigmatism of the cornea, which is a small part of the total refraction." (Tr. 21-13 to 18)

Dr. Plain then proceeded to explain that the information obtained by this measurement did not figure into the lens prescription:

> "* * * this does not determine any prescription because it does not—the instrument used to measure corneal curvature does not measure the curvature of the lens, which in itself can produce a great deal of astigmatism.

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It is impossible to measure the rear curvature of the eye back of the retina, which in turn, by its structure, can produce some astigmatism or a difference in curves. In turn, it can't measure the length of the eye itself, which by a tortion or a distortion can produce astigmatism. So, my answer is this produces one small part of a reading." (Tr. 21-18 to 22-4)

Dr. Plain insisted that:

"The astigmatism considered in the prescription has to be the sum total of all of the astigmatism that we can uncover, not just one part." (Tr. 22-7)

Total astigmatism is determined:

"Principally by the measurement of the total refraction, which takes into account all of the curvatures involved, by retinoscopy and by the neutralization of the shadows or the moving lights coming back to my eye after certain lenses are applied. This measures the total astigmatism to a fairly high degree of accuraey." (Tr. 22-13)

Dr. Plain explained that the only instance in which it was important to determine corneal curvature was in the fitting of contact lenses (Tr. 22-22). He does not even have an instrument for making this test (Tr. 23-6).

Dr. Fonda explained the matter in precisely the same fashion (Tr. 120 to 122). Since he has been doing contact lens work, he now has a keratometer (Tr. 121-13).

Dr. Curcio attempted to develop a contrary view (Tr. 354 to 361) but finally had to admit "These cases I gave you are unusual. That is true" (Tr. 361-18).

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Dr. Shlaifer seemed to be of Dr. Curcio's view although he had to admit that Duke-Elder and many ophthalmologists would disagree with him (Tr. 444 to 448). Incidentally, Duke-Elder, speaking of the keratometer, stated: "as a clinical instrument it is both misleading and inaccurate and should never be relied upon" (Tr. 446-4).

Dr. Moskowitz supplied the interesting information that at the Scott Air Force Base, where eye tests were given to prospective pilots, the clinic did not even have a keratometer (Tr. 477-16).

(c) Fusion and steropsis.

These were explained by Dr. Plain as follows:

> "Fusion—The function of fusion is one where both eyes —the image of each eye is received separately in the brain, and this is a mental function. The brain picks up the images from each side and fuses them into one composite picture, if fusion is normal. * * * Stereopsis is actually another part of fusion. In other words, does he have, in addition to fusing the two pictures into one, is he able to have depth perception on top of it." (Tr. 12-15 to 13-6)

Since stereopsis is synonymous with third degree fusion, the tests necessarily duplicate each other to some extent (Tr. 20-15 to 22).

Dr. Plain explained that the lack of depth perception was not correctible by lenses:

> "Because depth perception is a function dependent upon muscle status and also to a high extent upon brain function, the interpretation of the picture as made by the brain, the visual center of the brain. Now, I don't know of any glass that can correct a muscle function.

which produces poor stereopsis. That is as the mechanical part: Nor do I know of any glass that will improve this stereopsis function of the brain in the center of the brain, in his brain center." (Tr. 23-15 to 24)

Drs. Plain and Fonda agreed that with respect to stereopsis and fusion, as with the other muscle tests, the more detailed measurements are not made routinely but are undertaken only if abnormality is indicated by gross examination and the cover test (Tr. 93-8; 119-11).

Dr. Cureio is in accord with Dr. Plain as to the meaning of these tests (Tr. 326 to 327). Though he stated on direct examination that a lens prescription might be modified in the light of defects in fusion or depth perception (Tr. 326-19; 327-23), on cross examination he admitted that the normal test for stereopsis made by an optometrist would not figure into a lens prescription (Tr. 354-18). The doctor suggested some cases which he admitted are "unusual" (Tr. 365-1) and beyond the range of the normal optometrist (Tr. 365-8) where there could be a lens prescription. He admitted "The optometrist at large doesn't do it" (Tr. 365-14) and that it requires special equipment (*Id.* at 4). He admitted that "Offhand I don't know that it [stereopsis] would" . . . "figure in the numerical value of the prescription" (Tr. 352-25).

4. *Examination to discover pathological conditions.* This aspect of the examination includes ophthalmoscopic examination, visual fields, and external findings (Nos. 3, 4, 13, 14).

(a) The ophthalmoscopic examination is essentially an examination wherein the examiner looks inside the eye with an ophthalmoscope, an instrument designed to enable the examiner to focus upon different depths within the eye.

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The points made by Dr. Plain with respect to an ophthalmoscopic examination were:

1. If an examination is made through an undilated pupil, "it is a completely limited examination, for it only sees approximately 20% of the central surface of the interior of the eye. It neglects the condition of the outside or the periphery of the retina. It neglects the periphery of the lens. It does not see the vessels at the ora serrata, which is way out on the periphery." (Tr. 9-7)

By contrast, he pointed out:

"If the pupil is dilated sufficiently, one can see approximately 80% or perhaps 85% of the total interior content." (Tr. 9-16)

An optometrist is of course forbidden to dilate the pupil (Tr. 532-19).

2. Optometrists were simply not qualified to make a pathological examination (Tr. 34-20). He emphasized that an optometrist could be expected to discern pathology only "if it is in a place that is accessible to him. * * * And if it is gross." (Tr. 86-16).

He made the point that in view of the foregoing, when an optometrist discerns pathology through the limited facilities and with the limited training available to him, it is most likely that there are other symptoms (Tr. 96-20).

Dr. Fonda had the same view as did Dr. Plain in this respect (Tr. 142-20). He had the advantage of being able to refer to his experience as an optometrist and testified that he was sure that as an optometrist he could not have diagnosed the cases of incipient pathology that he now understands (Tr. 142-8).

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Doctors Curcio and Shlaifer were not in disagreement as to the limited scope of the pathological examination that could be made by the optometrist but nevertheless urged the view that optometrists did have sufficient training to recognize some pathological conditions.

(b) Visual fields. Dr. Plain described the visual fields test as follows:

> "This [confrontation] is a test, a gross test, I must say, where the examiner tries to determine if there is anything wrong with the peripheral field of vision. The patient holds his eye fixed on one object and confrontation is roughly done by having the examiner wave a finger in the various peripheries in the field of vision, and the examiner determines if any of these fields are deficient.
>
> "This [central], again, is a test from a finer part of vision. The central part is the part which we use in reading and in fine discrimination. This can only be done, in my opinion, on a tangent screen. It is a highly technical test. It requires extreme cooperation from the patient, because he has to fix his eye, without moving, on a small object held for a distance in front of him, and while he is looking at this object he must be able to perceive the moving in or the moving out of exceedingly small objects held on a wand. The object he would be asked to see would be in the magnitude of 1 millimeter in size. It is a highly specialized test which requires, in addition to good technique, the extreme cooperation of the patient." (Tr. 13-13 to 14-9)

The purpose of these tests is not to correct the eye but to determine the existence of pathology. Dr. Plain pointed

out, however, that the confrontation test was so gross that the only pathology that could be discovered thereby would be such as would have given some other more serious symptomatology (Tr. 25-7).

In his own practice he never gives visual fields tests unless there is some indication of their necessity (Tr. 93-25).

Dr. Fonda's practice is exactly the same (Tr. 122-9). He agreed with Dr. Plain that the visual fields test by confrontation is as he said "useless" because by the time pathology is so gross that "a defect may be elicited by confrontation test, the patient is already sick" (*Id.* at 18).

Dr. Curcio agreed that the fields test was designed to discover pathology (Tr. 376-9), as did Dr. Shlaifer (Tr. 459-15).

During the cross examination of Dr. Shlaifer it was pointed out that Duke-Elder made no mention of the test of visual fields in his routine examination (Tr. 455-13), notwithstanding that Duke-Elder also said (and the following was quoted by counsel for the Board when he presented Duck-Elder's work at the first hearing):

> "No attempt should be made to correct an error of refraction by optical means until a general examination of the eyes has been undertaken and disease has been excluded." (A205a-16).

Even Dr. Shlaifer had to admit that the fields test by confrontation was quite crude and that the sought-after pathology might escape the examiner using that test (Tr. 460-25).

Dr. Moskowitz also explained that the fields test referred to in the Board's Rule "regrettably is a very crude one" (Tr. 486-2) and a true fields test requires use of a perimeter and a tangent screen (Tr. 485-7 to 16).

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(c) External findings. This was described by Dr. Plain as being a gross examination of the external portion of the eye (Tr. 8-10 to 15). It is obviously designed to discover pathological conditions in the external portion of the eye.

In respect to all the pathological tests Dr. Plain expressed the view that they did more harm than good in the hands of an optometrist. He has a number of optometrists under his supervision in servicing the parochial schools of Newark (Tr. 23-16) whom he literally does not permit to do anything other than refractions. His view was that the very concept that a complete eye examination—including one for pathological conditions—could be obtained from an optometrist was genuinely dangerous. In answer to questions by the Court he put the matter as follows:

> "He [the patient] has been given what he considers a complete examination, if all these 15 points are gone through. It is time-consuming. The man, who is a doctor—Most patients don't know the difference between us. And he is told, 'Your eyes are all right. Here are your glasses.' Whereas actually they may be far from all right. This is the false sense of security. The very length of this examination makes the patient think everything is in order."

See also his testimony (Tr. 25-3 *et seq.*; 95-25 *et seq.*).

Dr. Fonda, who had the advantage of having been an optometrist, agreed (Tr. 124-8).

Repeatedly the medical doctors who testified for the appellants distinguished the function of refraction from that of discovery of pathology (Tr. 41; 67).

Appendix H

Extract from Motion to Dismiss before the Board of Optometrists Raising Federal Constitutional Question

Mr. Stavis: I would like to make a motion.

I move the board to dismiss the complaints against Doctors Lionel and Albert Weston on the following grounds:

Number one, the statute under which the board purports to proceed is invalid in that the Legislature may not constitutionally under either the Federal or State Constitution invade the practice of a profession to determine how a person may practice his profession. The Legislature may very well prescribe a test to determine whether a professional is qualified, but having determined a professional is qualified, then by definition we are dealing with an (184) exercise of judgment and skill and the Legislature may not and the board does not have the power by the authority of the Legislature to prescribe exactly how the optometrist shall perform his functions.

I point out to you obviously if this were not so, doctors could be told they must put every patients of theirs through a whole series of tests, and lawyers could be told they must expose every one of their clients to a wide variety of tests and services, which in their judgment is unnecessary, and the practice of professionals would then cease to be what we know them to be, and the Legislature would have exercised a power it does not have in our society.

Appendix I

Extract from Brief before the Supreme Court of New Jersey Raising Federal Constitutional Question

Point I

RULE 8 OF THE BOARD OF OPTOMETRISTS AND THE UNDERLYING STATUTE AS HERE APPLIED ARE UNREASONABLE AND AS SUCH ARE VIOLATIVE OF FEDERAL AND STATE CONSTITUTIONAL GUARANTIES OF DUE PROCESS.

We propose to demonstrate that the Rule and the statute are unreasonable on their face on either of two approaches: (a) substantively, insofar as they provide that a person practicing a profession may be directed by administrative fiat as to the details of the performance of his duties, and (b) procedurally, insofar as they provide for mandatory suspension or revocation of license without even permitting a showing that there was no connection in the particular case between failure to comply with the Rule and the needs of the patient.